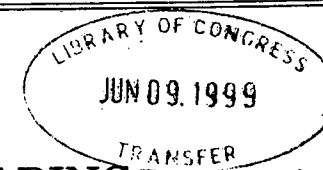


S. HRG. 106-12

INDIAN TRUST FUNDS



JOINT HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

AND THE

COMMITTEE ON ENERGY AND
NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING ON INDIAN TRUST MANAGEMENT PRACTICES IN
THE DEPARTMENT OF THE INTERIOR

MARCH 3, 1999
WASHINGTON, DC



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response, and the level of direction and the resources provided by Congresses over past decades has not been used to their best ability.

The Federal Government, by law, is to be the trustee of Native American people. When the Trust Fund Management Act of 1994 was passed, I was hopeful that this accounting situation would be remedied. Unfortunately, this has not been the case. In 1996, I was appointed by Chairman Young to the Congressional Task Force on Indian Trust Fund Management, to review and study the management and reconciliation of funds administered by the Department of the Interior's Office of Trust Fund Management. Those meetings were productive, yet 3 years and many millions of dollars later, this problem still persists.

My concern remains, where are we now, and what resources does the Department need to ensure that this problem is eliminated in the shortest amount of time? Far too much time and resources have been exhausted attempting to remedy this deplorable situation, which affects far too many of South Dakota's poorest people. This is one of the most urgent problems we face in Indian country, and there are so many more problems that flow from, or the solutions flow from the inability to come to terms with this issue. Congress has been to this table at least 10 times in the past few years. I do not want to revisit this issue 10 more.

Mr. Secretary, I commend your intent to remedy this situation, however, as much as I would like to see this come to a conclusion, I am not yet convinced this daunting task will be completed before you leave office. before you leave office. Interest remains in pursuing actions to afford you the resources necessary to complete this job once and for all. I look forward to receiving testimony on this important issue and will continue to closely monitor your progress. I would also like to ask both Chairman Campbell and Chairman Murkowski to revisit this issue in the near future, in order to gain assurance that steps are being taken to right this terrible wrong against the Native people of this country.

PREPARED STATEMENT OF SENATOR CRAIG THOMAS, U.S. SENATOR FROM WYOMING

Mr. Chairman, as a member of both the Indian Affairs and Energy Committees I have more than a passing interest in the subject of today's hearing. As the ranking Republican of the House Subcommittee on Native American Affairs, I worked long and hard with my House colleagues conducting a series of hearings looking into the Indian trust fiasco and crafting legislation to deal with the problem which culminated in the Reform Act of 1994.

I realize that the breadth and complexity of this problem means that there's no quick fix. But we cannot continue to ignore the problem, to drag our heels, to blame others for the failure to act or to follow through. We need to take this bull by the horns and get on with solving the problem.

I heard Secretary Babbitt say yesterday at an unrelated hearing that Interior's not really to blame for the problem, or for disregarding Judge Lamberth's order, and that this administration has done more than any previous administration to straighten out the problem. Well Mr. Chairman, in my opinion this administration has only addressed the issue because we in Congress, in effect, required them to. And the fact that a Federal judge has cited the Secretary for contempt leads me to the obvious conclusion that this administration isn't addressing the issue well.

I look forward to hearing the testimony this morning, and to working closely with you, Mr. Chairman, on this issue in the future.

STATEMENT OF

BRUCE BABBITT
SECRETARY OF THE INTERIOR,

Accompanied by

KEVIN GOVER
ASSISTANT SECRETARY - INDIAN AFFAIRS,

JOHN BERRY
ASSISTANT SECRETARY - POLICY, MANAGEMENT AND BUDGET,

THOMAS M. THOMPSON
ACTING SPECIAL TRUSTEE FOR AMERICAN INDIANS,

U.S. DEPARTMENT OF THE INTERIOR,

Before the

SENATE COMMITTEE ON INDIAN AFFAIRS AND
THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

March 3, 1999

The purpose of today's hearing is to discuss my recent actions taken to reorganize and strengthen the Office of Special Trustee. I welcome the opportunity to explain why these actions were necessary. Before I do, however, let me briefly address the matter of the contempt citation.

Contempt Citation

Mr. Chairman, as you know, last week Federal District Court Judge Lamberth found Secretary of the Treasury Rubin, Assistant Secretary Gover and me in contempt for failing to comply in a full and timely manner with certain discovery orders. These matters and the claims of approximately 300,000 IIM account holders remain before Judge Lamberth. The basis for his decision is a matter of public record. We have apologized to the court for the government's failures in this litigation and intend to do all that we can to be fully responsive to the Court's orders. I do want to indicate that at the end of trial the government recommended the appointment of a Special Master, as a way of addressing many of the discovery issues that have proven to be difficult.

Last week Judge Lamberth appointed Alan L. Balaran to serve as Special Master. The Special Master will oversee the discovery process and administer the production of documents ordered by the court in its November, 1996 and May, 1998 document production orders. Additionally, the Special Master will report on the adequacy of the steps being taken by the Government to

come into compliance, and file monthly reports about the Government's progress. He also will recommend resolution to the court of any discovery dispute that arises which cannot be resolved by the parties. We think this process will be helpful, will assure that documents are produced, and ensure that the court is fully apprised of any difficulties that arise. We intend to cooperate fully with the Special Master and the plaintiffs in this effort.

Trust Funds Reforms

Before turning to the specifics about the reorganization and the actions we are taking on a number of fronts, let me briefly outline what is occurring within the Department on the broader front of trust funds reform.

Our responsibilities for and the trust services we provide to individual Indian allottees and their heirs date back more than 100 years to the passage of the General Allotment Act of 1887, a widely acknowledged failure whose legacy continues to this present day -- complicated land ownership patterns and complex relationships with tribal governments. This 112 year old act divided Indian lands into 40, 80, and 160 acre parcels for individual tribal members and families. When the law was enacted, these individual parcels were slated to remain in trust for a period of no more than 25 years. Yet, these parcels continue to remain in trust today, now jointly owned in common by hundreds, and in many cases, thousands of individual Indians, each with an undivided interest in the whole parcel. For example, some of the parcels, after five generations, now have owners who hold a seventy seven one hundred millionths interest in the parcel. The income derived from the use of these lands through grazing, mineral, and other leases has to be divided to the forty-fifth decimal place.

I provide this background for contextual purpose, so that you have an understanding of the complexity of the problem we all, this Administration, this Congress, and now the courts, are trying desperately to solve. This is not a simple question of money management. Rather it is a problem rooted in historical land ownership and land management patterns and in the management of income derived from these lands for hundreds of thousands of beneficiaries.

Fixing the Future

What are we doing about it? Over many decades, the Bureau of Indian Affairs (BIA) record keeping and trust management systems simply have become inadequate. Congress, the GAO, OMB, the Department, and Indian account owners have all agreed that reform is needed. However, this is the first administration in 100 years to have attempted a serious correction of that deplorable situation.

Improvement of the Department's trust fund management responsibilities is happening at an increasing pace beginning with acquiring and installing commercial trust and investment accounting systems for tribal trust funds, significantly better internal controls through yearly audits of financial operations, daily reconciliations of all trust related cash, and use of third party

services for safekeeping of nongovernment investment securities. We are continuing to move aggressively to make needed improvements.

In a little over a year, the Department has cleaned up over 200,000 IIM (Individual Indian Money) account files, two-thirds of the total. By the end of 1999, we will have completed the installation of a commercial bank trust fund accounting system for all IIM and tribal accounts. The Department has awarded a contract to replace BIA's key trust management system with modern commercial systems for lease management, fiduciary accounts receivable, land records and trust administration. Supporting these efforts is work on records management, training, policies and procedures, and additional internal controls.

Trust fund systems will be modernized and centralized so that the trust data the Department uses is accurate and current. More importantly, the systems and information will be available to tribal managers and Indian trust fund owners all across the United States.

The Department has been increasing the budgetary investment in trust reform. The FY 2000 budget seeks more than \$100 million for the Office of the Special Trustee to continue improvements. All told, the Department will devote more than \$150 million to trust reform. No Administration in history has asked Congress to invest these vast sums for trust assets and trust funds management. I am asking for your partnership in this effort.

Settling the Past

This effort to fix these long neglected systems does not absolve us from settling the past. We have worked hard on this front too. With the direct guidance from the Congress and the investment of \$ 21 million in appropriated funds and 5 years of effort (1991 - 1995) the Federal Government attempted to resolve accounting issues surrounding the 1,500 accounts held by 338 tribal entities with combined assets in excess of \$2.5 billion.

The Tribal Reconciliation Project was undertaken by Arthur Andersen LLP, under the supervision of the Department. The basic reconciliation procedures of the project encompassed the reconstruction of \$17.7 billion in non-investment transactions, of which \$15.3 billion -- about 86 percent -- were reconciled. For the reconciled transactions, approximately \$1.87 million in transactions were in error -- an error rate of one-tenth of one percent. The remaining 14 percent of the transactions (\$2.4 billion) were deemed to be "unreconciled," meaning that the Department could not locate all source documents required under the project procedures to verify the accuracy of the general ledger entry for the transactions within the time frame allotted to the reconciliation process. The Department, with the assistance of another accounting firm, subsequently has been able to reconcile another \$.5 billion in transactions, leaving approximately \$1.9 billion in unreconciled transactions. Because this is a complicated matter, the news media erroneously reported that \$2.4 billion had been "lost". In reality, the \$2.4 billion had been recorded in the accounts, but the source documents to provide the origin of the transactions could not be located during the time frame of the project.

We need to come to closure and settle the past with regard to tribal accounts. I met with Chairman Campbell and he agreed to take on this issue legislatively, the only way in which it could be finally and fairly resolved. On July 22, 1998, Assistant Secretary Gover testified before a joint session of the Senate Committee on Indian Affairs and the House Committee on Resources on HR 3782, a bill to compensate certain Indian tribes for known errors in their tribal trust fund account uncovered by the reconciliation projects, and to establish an informal dispute resolution process to settle other disputes regarding tribal trust fund accounts. Regrettably, neither body acted on the legislation in the last Congress.

During that same tribal reconciliation effort, Arthur Andersen provided an estimate that it would cost between \$108 million to \$281 million to conduct a similar reconciliation of the 300,000 individual Indian accounts. The Congress and the GAO did not recommend following such a course of action due to the high costs involved and the likelihood of little resolution at the end of the day.

IIM Litigation

In June of 1996, the Cobell litigation (*Cobell v. Babbitt*) began. This class action lawsuit stems from the government's alleged mismanagement of the Individual Indian Money trust accounting system. As mentioned earlier, the United States acts as trustee of money accounts on behalf of individual Indian beneficiaries with interests in land allotted to them. These land allotments held in trust by the Government, like tribal lands, earn income by the lease of their grazing, farming, timber and mineral rights. The income from these leases provides the majority of money flowing through these accounts. In the course of this IIM litigation, the U.S. District Court, as part of the discovery process ordered the production of records for the five-named plaintiffs and their predecessors in interest, including Eloise Cobell, who originated the lawsuit.

Document production for the five named plaintiffs has proven difficult. The locating of these documents is a complex and laborious task. Because of fractionated interests hundreds of owners in one parcel is common. Only one set of documents, the IIM jacket file, is filed by the name of the account holder. Land-related documents are kept where the land is located, i.e. at 12 BIA Area and 92 Agency Locations. Information is filed by tract number or by lease number and not owner name. To locate related documents various reports must be generated including chain of title and ownership interest and encumbrances reports. Older documents are located at Federal Records Centers and the Archives.

Locating financial transactional documents has been even more complicated because day-to-day transactional documents are filed by date and type of document. Also, account analysis must be undertaken so that all documents related to the account transactions can be located. The existence of fractionated interests means that hundreds of people may own a small portion of one lease, and receive the related payment, which makes analyzing the account even more complicated. Fractionated interests also mean that lease income may be deposited into a holding

account, or Special Deposit Account, while a determination is being made as to who are beneficial owners. This creates additional documents.

Automated transaction listings for IIM accounts became available in approximately 1985, however, prior to that time, a combination of accounting machines and manual systems were used to record transactions, which creates additional complexity to researching older IIM accounts.

OST Reorganization

When my senior staff learned that U.S. Federal District Court Judge Lamberth was contemplating a contempt citation for our failure to produce the ordered records, I determined that it was time to address some longstanding issues.

As part of this examination, it became clear that the Office of Special Trustee (OST) had, for whatever reasons, encountered a series of obstacles and roadblocks that it has been unable to overcome in producing documents for the court in a timely and effective manner.

As I reviewed this situation, I became convinced that more direct oversight of the OST's field operations, particularly the records management function and litigation, was needed in the Office of the Special Trustee if we were ultimately going to succeed in these tasks. A number of operational problems came to the surface including lack of day-to-day oversight of field operations, the lack of a coherent, affirmative plan from the Washington office to meet litigation demands, a failure to develop an adequate records management plan in compliance with Departmental and Congressional Committee directives, and an unusually high number of complaints of friction in resolving records issues between the OST field organization and other entities both inside and outside of the Department.

I believed it was imperative to strengthen day-to-day management of the OST field organizations, and I put two changes into effect to accomplish this. First, I directed that a new position of Principal Deputy Special Trustee be created with direct line authority over the OST's field organizations so that there could be direct accountability and oversight exercised by the OST's Washington Office. The Special Trustee's Deputy for Operations, a seasoned career manager previously selected by Mr. Homan, lacked line authority over the OST field operations. The organizational alignment of placing a principal deputy to manage day-to-day operations is an approach that is used in nearly every other bureau and office in the Department. Second, to improve the OST's responsiveness in meeting critical records deadlines and to improve the coordination of records management across the organizations that must share this information, we obtained the services of an expert records manager from the Department of State who has had an outstanding, exemplary career in the field of records management and placed him in charge of the entire records organization and the litigation support function. A records management and records retention function as complex as ours requires the expertise and experience of a manager who has made records his career.

Neither of these actions diminished or usurped the Special Trustee's authority. Section 3(b) of my Secretarial Order explicitly provides that the Deputy for Operations (now designated as the Principal Deputy) continues to report directly to the Special Trustee. I informed the Special Trustee on January 6 that he would retain all of his responsibilities and authorities enumerated in the Trust Funds Reform Act. The changes that I ordered do not conflict with the statutory responsibilities of the Special Trustee and his direct reporting relationship to me.

On January 7, the Special Trustee unexpectedly provided me with a one sentence resignation letter and he left immediately. We will work with the White House to identify highly qualified candidates for the President's consideration who meet the requirements of the Special Trustee position as set forth in the Reform Act. After a nomination is made, this body can consider and hopefully confirm the President's nominee for this critical position.

In the meantime, the Principal Deputy, Thomas M. Thompson, will run the Office of Special Trustee until the position is filled permanently. Mr. Thompson has had an exemplary career as a manager in this Department before being selected by Mr. Homan as his Deputy for Operations. He has been closely involved in trust issues over the years, and was the principal architect for the High Level Implementation Plan that is guiding our trust reforms.

Authority for the Reorganization

Committee staff has inquired about my authority to reorganize OST by Secretarial Order and how it comports with the intent of the 1994 American Indian Trust Fund Reform Act. Every Secretary of the Interior has had broad authority under Section 2 of the Reorganization Plan No. 3 of 1950 (5 U.S.C. Appendix) to organize the bureaus and offices which report to him. This authority has been used regularly and routinely over nearly half a century by Secretaries of the Interior under both Democratic and Republican Administrations. There is no conflict in the use of this authority with the authority and responsibilities enumerated in the 1994 Reform Act. The 1994 Act provides the Special Trustee with broad policy oversight of the reform effort and stipulates that the Special Trustee report to the Secretary of the Interior.

The operational activities that are the focus of the January 5, 1999 Secretarial Order were originally assigned to the Special Trustee by me in 1996 under my general management authority. The secretarial Order does not alter the assignment of those responsibilities to the Office of the Special Trustee. Rather, it merely provides day-to-day oversight of these operational entities, within the Special Trustee's office.

Other Changes

The Bureau of Indian Affairs is strengthening its responsiveness to the court orders and the appointment of the Special Master by forming a special team to intensify the effort in BIA to locate and produce as many records as possible.

Likewise, the Justice Department has notified the court of a complete restructuring of the litigation team in the case, with four new senior counsel overseeing the case on a day-to-day basis and additional staff added to improve its performance.

Congressional Assistance is Needed

Congress needs to be more deeply involved on a number of fronts. First, to enact the reforms set forth in the High Level Implementation Plan, the Department has requested in its FY 2000 Budget over \$100 million for the Office of Special Trustee. This \$60 million increase is the largest percentage increase for any bureau or office in the Department.

This critical increase is needed to bring about the commercially proven systems essential to raise our trust performance to standards set forth in the Reform Act. The Budget Committee of this body and the Senate Appropriations Committee will need to provide the required budget allocations and appropriations. In addition to the FY 2000 budget, there is supplemental funding needed in FY 1999 that has been transmitted to Congress, as well as additional needs stemming from the recent court rulings and appointment of the Special Master.

Second, Congressional action is needed to stem the rising tide of fractionated ownership of Indian lands. Twice the Congress has enacted legislation to consolidate Indian land holdings, only to fail constitutional challenges in the Supreme Court. The House and Senate Appropriations Committees provided \$5 million in FY 1999 to fund the cost of an Indian land consolidation pilot. The pilot effort is designed to purchase small, highly fractionated individual interests in trust lands and return those interests to the Tribes. This consolidation pilot is now underway. The President's budget provides \$10 million to expand this effort in FY 2000. These are important first steps to solving the longstanding, root cause of many of the problems we have discussed today. However, without action by this body to permanently curb the geometric growth of these interests by the passage of Indian land consolidation legislation, even the gains in the pilot effort will be reversed. More importantly, the economic viability of allotted Indian lands will be severely compromised and the costs of administering development of these lands and maintaining IIM accounts will skyrocket. We need definitive Congressional action, and we need it at the earliest possible time.

Finally, as I mentioned earlier, we must come to closure on the past if the reforms we are making for the future are to take hold. Let me be specific. We can build the world's greatest trust funds system, but if it cannot begin with an agreed upon account balance, what will such a system produce? While we expect the Cobell litigation to lead eventually to agreed upon balances for the 300,000 IIM accounts, we need action from this body to settle known errors and commence a mediation-based process to come to resolution on disputed tribal balances.

Conclusion

Mr. Chairman, we have an historic opportunity to fix - once and for all - the Federal Government's responsibilities for Indian trust assets and trust funds. I have made this my highest priority. I do not want to pass on to my successors what I inherited. To succeed, this effort must be a partnership with Congress. I urge you to work with me and to do all in your power to provide the assistance we need to get the job done.

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United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Honorable Ben Nighthorse Campbell
Chairman, Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We are pleased to enclose responses to questions submitted to Secretary Bruce Babbitt following the March 3, 1999, joint oversight hearing on American Indian Trust Management Practices in the Department of the Interior.

Thank you for the opportunity to provide this material to the Committee.

Sincerely,

Jane M. Lyder
Legislative Counsel
Office of Congressional and
Legislative Affairs

Enclosures

cc: Honorable Frank Murkowski
Chairman
Committee on Energy and Natural Resources

Honorable Daniel K. Inouye
Ranking Minority Member
Committee on Indian Affairs

Honorable Jeff Bingaman
Ranking Minority Member
Committee on Energy and Natural Resources

Honorable John McCain

Honorable Bob Graham